United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

74-1911

No. 74-1911

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P/S

IN THE UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

ROYAL STEUBING, ET AL.,

Appellees

v.

CLAUDE S. BRINEGAR, ET AL.,

Appellants

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NEW YORK

BRIEF FOR THE FEDERAL OFFICIAL

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OPINION BELOW

The unreported decision and order of the district court, Honorable John T. Curtin, is set forth at pages 137a-151a of the Joint Appendix.

JURISDICTION

Judgment was entered May 20, 1974. Appellant Brinegar filed a notice of appeal on July 19, 1974. Appellant Schuler filed a notice of appeal on June 19, 1974 (J.A. 157a-160a). This Court's jurisdiction rests on 28 U.S.C. sec. 1291.

QUESTION PRESENTED

Whether laches bars injunctive relief in a suit instituted in November 1973 to stop construction of a highway bridge across Lake Chautauqua pending compliance with the National Environmental Policy Act where demolition for the approaches had been completed 15 months earlier.

STATEMENT

This is an appeal from an order enjoining continued construction of a highway bridge across Lake Chautauqua pending compliance with the National Environmental Policy Act (NEPA) 42 U.S.C. sec. 4321 et seq., enacted by Congress January 1, 1970.

On November 23, 1973, the Chautauqua County Environmental Defense Council and others (hereinafter referred to as the environmentalists) instituted this action to enjoin the continued construction of the subject highway bridge. The environmentalists alleged violations of NEPA; of the Federal Aid Highway Act, 23 U.S.C. sec. 101 et seq.; of the Clean Air Act Amendments of 1970, 42 U.S.C. sec. 1857 et seq.; and of the Department of Transportation Act, as amended, 49 U.S.C. sec. 1651 et seq.

The bridge was designed as a part of the Southern Tier Expressway which runs along the southern part of New York State to the Pennsylvania State line for a distance of

approximately 250 miles. For planning purposes, the highway segment which includes the bridge was designated as section 5c. Section 5c is 2.5 miles long and the span over the Lake is 0.8 mile (J.A. 77a).

By stipulation of the attorneys for the parties and by order of the court, the matter was referred to the magistrate to hear and report "the facts of this matter concerning the issue of laches and/or delay and the equitable considerations in connection therewith as they relate to the appropriateness of granting a preliminary injunction or dismissing this action" (J.A. 76a).

The evidence presented before the magistrate established that initial plans for the highway in question were authorized by the State in 1962. The U.S. Bureau of Public Roads (BPR) approved the location of the bridge in 1967 (J.A. 77a). On March 30, 1970, the BPR authorized the commencement of negotiations for acquisition of a right-of-way for Section 5c (J.A. 78a).

On May 24, 1972, the Federal Highway Administration (FHWA) as successor to the BPR granted plans, specifications and estimates (PS&E) approval for contracts calling for the

demolition of buildings on the rights-of-way encompassing Section 5c and portions of the bridge approaches on the east and west sides of the lake. These demolition contracts were awarded in June 1972, and the demolition work was completed in August 1972. Approximately 70 buildings were demolished and 20 families relocated (J.A. 78a).

On May 9, 1973, the FHWA granted PS&E approval for construction of the bridge substructure. On July 9, 1973, a contract in the amount of $14,700,000 was awarded for construction of the bridge substructure (J.A. 78a). In this regard, the magistrate found (J.A. 78a-79a):

> Between July 9, 1973, (the contract award date), and November 23, 1973, (the date of commencement of this action), trees have been removed, land has been stripped, channel relocation work, dredging, and other general work preparatory to the driving of pilings and construction of the substructure has been done. Subsequent to November 23, 1973, and prior to January 17, 1974, one of a contemplated five test pilings was put in. As of December 14, 1973, the contract for the bridge substructure was approximately 3 percent complete (affidavit of Donald Ketchum, Regional Director, New York Department of Transportation, Exhibit S-2), and approximately $4.7 million has been spend on the project from 1962 to date. The present contract for the substructure calls for

> the installation of approximately 250 pilings and for completion of the substructure in June 1976. A contract for the superstructure of the bridge would be expected to be completed one to two years thereafter and, thus, according to present expectations, the bridge could carry traffic in 1977 or 1978. The total estimated cost of the completed bridge is about $29 million.

There was also evidence "that the projected cost of shutting down the job for seven months would be $1.8 million (Tr. 86), and the cost of cancelling the present contract and reletting at a later date would be $2.8 million (transcript p. 91)" (J.A. 86a).

In his report, the magistrate noted that the "question of the erection of the bridge over Lake Chautauqua has been the subject of much discussion and publicity from at least 1965" (J.A. 79a), that there had been numerous meetings over the years between public officials and interested citizens "including some of the plaintiffs," and there has been "extensive newspaper publicity given to the issue" (J.A. 79a). In addition, the magistrate found (J.A. 79a):

> All of the municipal and regional planning boards in the area have included the concept of the Southern Tier Expressway in their programs and all of the maps and designs put out by these boards shows a contemplated bridge over the lake between Stow and Bemus Point. Thus, there is no

> question that the plaintiffs were, or should have been, aware of the fact that a bridge was contemplated. Plaintiffs also were, or should have been, aware in the summer of 1972 that buildings were being demolished in contemplation of the bridge construction. (fn. added.) 1/

Ultimately the magistrate recommended that plaintiffs' motion for a preliminary injunction be granted, pending a trial on the merits of this case (J.A. 95a). The recommendation was based on the determination that plaintiffs were not chargeable for any delay in bringing suit prior to the May 1973 PS&E approval for construction of the bridge substructure (J.A. 85a). The magistrate concluded that "the plaintiffs are not guilty of such delay in the institution of this action as to constitute laches" (J.A. 90a).

The federal and state appellants filed objections to the magistrate's report and moved the court to make certain specified findings of fact and conclusions of law (J.A. 99a-125a).

Initially, the district court, in its decision and order, set forth the facts as found by the magistrate. The court then approved "the magistrate's finding that [the May 1973] PS&E approval was the critical date" (J.A. 143a). The court concluded

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1/ See also defendants' proposed findings of fact numbers 32-35 (J.A. 114a) stipulated true (J.A. 127a).

"that the delay between PS&E approval (May 9, 1973) and the filing of this lawsuit (November 23, 1973) is not unreasonable." The court ordered that "a preliminary injunction against further construction of the Chautauqua Lake Bridge pending compliance with NEPA shall issue forthwith" (J.A. 150a). This appeal followed, Thereafter Tom Shagla and 14 other individuals filed a motion to intervene as party defendants. This Court granted the motion.

ARGUMENT

LACHES SHOULD HAVE BARRED THE GRANTING OF INJUNCTIVE RELIEF

We do not dispute that the Federal Highway Administration should comply with the National Environmental Policy Act. However, we believe that a proper application of the doctrine of laches should preclude enjoining construction pending compliance. In connection with the defense of laches, the district court ignored FHWA's PS&E approval on May 24, 1972, of the demolition of buildings on the bridge approaches, and their actual demolition by August 1972, relying instead on the PS&E construction approval of May 9, 1973. Obviously if May 1973 were the relevant date, laches would not apply.

The district court's choice of the 1973 date was based on an unjustified reliance on this Court's decision in Monroe County Conservation Council, Inc. v. Volpe, 472 F.2d 693, 699 (1973). The issue on appeal in Monroe County was whether an environmental impact statement was required to be filed. Instead, here, the issue submitted to the district court for decision was whether injunctive relief was barred by laches. In the case at bar had the district court considered all of the surrounding circumstances instead of focusing on the 1973 PS&E approval, it is unlikely that injunctive relief would have been granted.

As set forth in detail in our statement of facts, supra, before this suit was filed, not only had demolition activities been concluded but in addition there had been substantial progress made in the construction work for the bridge substructure. Moreover, there was evidence that the projected cost of a seven-month work-stoppage was 1.8 million dollars and that the cost of cancelling the construction contract and reletting at a later date would be 2.8 million dollars. Furthermore, as the magistrate found (J.A. 79a):

> The question of the erection of the bridge over Lake Chautauqua has been the subject of much discussion and publicity from at least 1965. One public hearing was held in accordance with then existing Federal law, there have been numerous meetings over the years between public officials and interested citizens (including some of the plaintiffs), and there has been extensive newspaper publicity given to the issue. All of the municipal and regional planning boards in the area have included the concept of the Southern Tier Expressway in their programs and all of the maps and designs put out by these boards show a contemplated bridge over the lake between Stow and Bemus Point. Thus, there is no question that the plaintiffs were, or should have been, aware of the fact that a bridge was contemplated. Plaintiffs also were, or should have been, aware in the summer of 1972 that buildings were being demolished in contemplation of the bridge construction.

In suits under NEPA, as in any other suit for equitable relief, laches will be held a bar where warranted by the facts. Clark v. Volpe, 461 F.2d 1266 (C.A. 5, 1972); Lathan v. Volpe, 455 F.2d 1111, 1122 (C.A. 9, 1971); Maryland-National Cap. Pk. & Pl. Com'n v. United States Postal Serv., 487 F.2d 1029, 1035, 1042 (C.A. D.C. 1973); Greene County Planning Board v. F.P.C. 455 F.2d 412, 425 (C.A. 2, 1972), cert. den., 409 U.S. 849. While ordinarily the grant of injunctive relief is discretionary and will not be overturned on appeal, in this case the district court did not exercise its discretion on the relevant facts.

The district court was incorrect, as a matter of law in relying on the May 1973 PS&E approval, thereby committing reversible error. National Ben. Life Ins. Co. v. Shaw-Walker Co., 111 F.2d 497, 507 (C.A. D.C. 1940), cert. den., 311 U.S. 673. The matter should be remanded to the district court so as to give the court an opportunity to exercise its discretion in light of all the relevant equitable considerations.

CONCLUSION

For the foregoing reasons, the injunction should be set aside and the case remanded to the district court.

Respectfully,

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CERTIFICATE OF SERVICE

I certify that a typewritten copy of the Brief for the Federal Official has been served on counsel by placing same in the United States mail, postage prepaid, properly addressed, this 9th day of September 1974, to:

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